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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/941,400	08/28/2001	Devin Eugene Mix	12929.1064US01	6151
23552	7590	09/13/2004	EXAMINER	
MERCHANT & GOULD PC P.O. BOX 2903 MINNEAPOLIS, MN 55402-0903			GREEN, BRIAN	
			ART UNIT	PAPER NUMBER
			3611	
DATE MAILED: 09/13/2004				

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/941,400

Applicant(s)

MIX, DEVIN EUGENE

Examiner

Brian K. Green

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 30 August 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-34 and 36-48 is/are pending in the application.
- 4a) Of the above claim(s) 4,6,15,17,24,30,38 and 44 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3,5,7-14,16,18-23,25-29,31-37,39-43 and 45-48 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on Aug. 6, 2004 has been entered.

Election/Restrictions

Claims 4,6,15,17,24,30,38, and 44 have been withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in Paper No. 8.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3,5,7,11-14,16,18,22,23,25,28,29,31,32,36,37,39,40,43,45, and 46 are rejected under 35 U.S.C. 102(b) as being anticipated by Pyper (U.S. Patent No. 1,382,229).

Pyper shows in figures 1-5 a “fireplace” including a front panel (12 having an opening for viewing) and a flame simulation apparatus including a flame element (20) coupled to a moving member (21,22,23,24,25,28,29, and 31) that includes a plurality of blades (31) that alters

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the position of the flame element. Pyper shows in figure 3 that the moving means is adjustable about a vertical axis (the axis adjacent element 23 or element 25). The axis would be vertical when the back or front surface of the device is either secured or supported on a horizontal surface, i.e. attached to a ceiling, supported on a desk or table, during shipping, etc. Further, the term "vertical" is a relative term and as broadly defined the axis of the member is considered to be vertical. The examiner has taken the term "about" to mean "approximately" and as broadly defined, the blower is approximate or adjacent to the vertical axis. If the applicant means that the blower is around the vertical axis that would appear to be new matter since there does not appear to be any support in the specification or drawings for stating that the blower extends around the vertical axis. In regard to claim 2, Pyper shows a blower (28,29). In regard to claim 3, when the device is mounted on a ceiling or floor, depending upon the viewing direction, the blower can be considered to be below the flame element. Further, Pyper discloses on page 2, lines 60-65 the idea of mounting the blower on the top or bottom wall so the blower would have to be below the flame element when mounted in one of these positions. In regard to claim 5, Pyper shows a blower (28,29) and a mechanical device (21,22,23,24,25) for moving the position of the element (20) relative to the rest of the structure. The applicant defines in the specification, page 9, lines 1-8, that any mechanical means can be used to move the flame element. Since the applicant defines the mechanical means in such a broad manner, the mechanical device of Pyper is considered to fall within the applicant's definition of moving means. In regard to claim 7, Pyper shows a light source (19). In regard to claim 11, Pyper shows in figure 1 a log set (the structure directly below the flame in figure 1 is considered to be the log set as broadly defined). In regard to claim 12, some of the air from the blower in Pyper would move along the vertical

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axis. In regard to claims 23,29, and 37, as broadly defined, the blower of Pyper is considered to be along, i.e. near the vertical axis of rotation. In regard to claim 43, the examiner has taken the term "about" to mean "approximately" and as broadly defined, the blower is approximate or adjacent to the vertical axis. If the applicant means that the blower is around the vertical axis that would appear to be new matter since there does not appear to be any support in the specification or drawings for stating that the blower extends around the vertical axis.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 23,25-28,43, and 45-48 are rejected under 35 U.S.C. 102(e) as being anticipated by WO 01/57447 A1.

WO 01/57447 A1 shows in figures 1-13b an enclosure (8) having an opening (covered by transparent panel 10) for viewing a flame element (20) coupled to a moving member (34b) that that alters the position of the flame element and a blower (14) for moving the flame element (20). The moving member (34b) rotates about a vertical axis, the term "vertical" being a relative term and as broadly defined the axis of the member (34b) is considered to be vertical. The blower (14) is considered to be positioned "along" the vertical axis. In regard to claims 25 and 46, WO 01/57447 A1 shows light sources (18). In regard to claims 26 and 47, WO 01/57447 A1 discloses on page 13, last paragraph, the idea of making the flame element from silk. In regard to claims 27 and 48, WO 01/57447 A1 discloses on page 14, last paragraph the idea of treating the edges of the flame element to prevent fraying. In regard to claim 28, the blower (14) is positioned below the flame element.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 8,9,19,20,26,27,33,34,41,42,47, and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pyper (U.S. Patent No. 1,382,229) in view of Butterfield (U.S. Patent No. 4,965,707).

In regard to claims 8,19,26,33,41, and 47, Pyper discloses the applicant's basic inventive concept except for making the flame element from a silk material. Butterfield discloses in column 3, lines 65-66 the idea of making a flame element from a silk material. In view of the teachings of Butterfield it would have been obvious to one in the art to modify Pyper by making the flame element from a silk material since this would create a more realistic and amusing flame element. In regard to claims 9,20,27,34,42, and 48, Pyper discloses the applicant's basic inventive concept except for treating the flame element with a stiffening material. Butterfield discloses in column 3, lines 65-68 the idea of coating a flame element to improve reflectivity. In view of the teachings of Butterfield it would have been obvious to one in the art to modify Harrison by coating the flame element since this would create a more amusing and aesthetically pleasing display, the coating would inherently stiffen the flame element a small amount.

Claims 23,25,26,28,43, and 45-47 are rejected under 35 U.S.C. 102(e) as being anticipated by Harrison (U.S. Patent No. 6,461,011) in view of Quigley (U.S. Patent No. 1,945,072).

Harrison shows in figures 1-5 a “fireplace” including a front panel (any of the four side panels which have to be at least translucent in order to allow the flame to be seen) and a flame simulation apparatus including a flame element (14) coupled to a blower (18) that alters the position of the flame element. The blower (18) is positioned along (near) the vertical axis of rotation. Harrison does not disclose providing a moving means to move the flame element about a vertical axis. Quigley shows in figures 1-4 a display device (8) that is rotated about a vertical axis by a moving means (18-23,29-31). In view of the teachings of Quigley it would have been obvious to one in the art to modify Harrison by attaching a moving means to the fireplace since this would allow the fireplace to be rotated which would create a more amusing and attention grabbing display. In regard to claims 25 and 46, Harrison shows a light source (16). In regard to claims 26 and 47, Harrison discloses in column 2, lines 37-39 the idea of making the flame element from silk. In regard to claim 28, the blower (18) is positioned below the flame element.

Claims 27 and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Harrison (U.S. Patent No. 6,461,011) in view of Quigley as defined in claims 1,12,23,29,37, and 43 above and further in view of Butterfield (U.S. Patent No. 4,965,707).

Harrison in view of Quigley disclose the applicant’s basic inventive concept except for treating the flame element with a stiffening material. Butterfield discloses in column 3, lines 65-68 the idea of coating a flame element to improve reflectivity. In view of the teachings of

Butterfield it would have been obvious to one in the art to modify Harrison by coating the flame element since this would create a more amusing and aesthetically pleasing display, the coating would inherently stiffen the flame element a small amount.

Claims 10 and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pyper (U.S. Patent No. 1,382,229) in view of Hecker (U.S. Patent No. 5,426,879).

Pyper discloses the applicant's basic inventive concept except for attaching mirrored (reflective) surfaces to the back and side panels. Hecker discloses in column 5, lines 50-55 the idea of placing reflective material on the back and side panels to increase the amount of light reaching the front face. In view of the teachings of Hecker it would have been obvious to one in the art to modify Pyper by attaching reflective surfaces to the back and side panels since this would allow the flame element to be illuminated in a more brilliant manner which would create a more amusing and aesthetically pleasing display.

Applicant's arguments filed Aug. 30, 2004 have been fully considered but some of the arguments are not persuasive.

The applicant argues that the blower of Pyper is not positioned about the vertical axis. The examiner has taken the term "about" to mean "approximately" and as broadly defined, the blower is approximate or adjacent to the vertical axis.

The applicant argues that the blower of Pyper fails to provide moving air along the vertical axis as defined in claims 12 or 29. The examiner disagrees since the air from the blower of Pyper would be along, i.e. near or adjacent the vertical axis.

The applicant argues that the blower of Pyper is not positioned along the vertical axis of rotation as defined in claims 23,37, and 43. The examiner disagrees since the blower of Pyper would be along, i.e. near or adjacent the vertical axis.

The applicant argues that Harrison in view of Quigley fails to disclose a mechanical device coupled to the flame element that concentrically rotates the flame element about a vertical axis of rotation of the mechanical device as defined in claim 23. The examiner disagrees since as the flame element of Harrison is rotated by the platform of Quigley, the flame element would rotate about a vertical axis of rotations of the shaft (20) of the mechanical device.

The applicant argues that Harrison and Quigley fail to disclose or suggest disposing the flame element viewable to the observer within the chamber through only one of the plurality of enclosure panels as defined in claim 43. The examiner disagrees since a person observing the flame element from a position in which only one of the panels can be seen (i.e. from the side) than the person could only view the chamber through one of the plurality of panels.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian K. Green whose telephone number is (703) 308-1011. The examiner can normally be reached on M-F 7am-3:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lesley Morris can be reached on (703) 308-0629. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


BRIAN K. GREEN
PRIMARY EXAMINER

Bkg
Sept. 6, 2004